Award No. 18404
Docket No. TE-18780

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on The Akron, Canton and Youngstown Railroad, T-C 5741, that:

1. Carrier violated and continues to violate the Agreement between the parties when, commencing April 23, 1969, it required a Track Patrol Foreman to use the telephone at Bluffton, Ohio, Monday through Friday, to receive train lineups.

2. Carrier shall compensate N. G. Gregg, Agent-Operator, a two hour call for each date of occurrence.

Carrier docket: 174

EMPLOYES' STATEMENT OF FACTS:

(a) STATEMENT OF THE CASE

The Agreement between the parties, effective May 1, 1955, as amended and supplemented, is on file with your Board and by this reference is made a part hereof.

Claim was timely presented, progressed, including conference with the highest officer designated by the Carrier to receive appeals, and remains declined. The Employes, therefore, appeal to your Honorable Board for adjudication.

The claim arose when the Carrier established a Track Patrol Foreman's position at Bluffton, Ohio, a station at which an Agent-Telegrapher position formerly existed at the time the Agreement was entered into. Bluffton was subsequently changed to a non-agent prepay station when the agent's position was abolished and it was placed under the jurisdiction of the Agent-Telegrapher at Jenera, Ohio. With the establishment of the Track Patrol Foreman position at Bluffton, the Maintenance of Way employe assigned thereto commenced using the telephone to receive Track Car Operator's Line-Up of Trains, Form 41, from the train dispatcher each morning.

Exhibit "K" — June 11, 1969	— Appeal — General Chairman to Assistant to General Manager. Claims dated April 24, 25, 28, 29, 30; May 1, 2, 1969.
Exhibit "L" — June 20, 1969	— Appeal — General Chairman to Assistant to General Manager. Claims dated May 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 1969.
Exhibit "M" — June 30, 1969	— Appeal — General Chairman to Asistant to General Manager. Continuing claim beginning May 26, 1969.
Exhibit "N" — July 21, 1969	— Denial — Assistant to General Manager to General Chairman.
Exhibit "O" — July 24, 1969	— Declination not accepted — General Chairman to Assistant to General Manager.
Exhibit "P" — September 11, 1969	— Denial affirmed — Assistant to General Manager to General Chairman.
Exhibit "Q" — September 15, 1969	— Declination not accepted — General Chairman to Assistant to General Manager.

(Exhibits not reproduced.)

OPINION OF BOARD: Bluffton, Ohio formerly an open telegraph station, is now a non-agency prepay station under jurisdiction of the agency at Jenera, which is part of a dualized position subject to the telegraphers' agreement.

On the claim dates a maintenance employe used a telephone at Bluffton to secure from the train dispatcher a line-up of train movements necessary for operation of his motor car.

Claimant is the occupant of the dualized position of agent-operator at Mt. Blanchard-Jenera referred to above. He filed a claim for a "call" payment in each instance, asserting that violation of the agreement occurred when the maintenance employe received line-ups by telephone at Bluffton. Carrier decined the claims, and the resulting dispute was handled in the usual manner without a settlement being reached. The Employes then appealed to the Board for a decision.

Although several rules are cited in support of the Employes' position, the record clearly shows that the parties finally settled on Rule 20 as being the controlling agreement provision involved. This rule reads as follows:

> "No employe other than covered by this agreement and train dispatchers will be permitted to handle train orders or other instructions affecting the movement of trains, motor cars or other traffic at stations or offices where an operator is available, except in emer-

gency, in which case the operator will be entitled to a call at overtime rate of time and one-half time.

This rule does not apply to yard movements in Akron territory."

This rule resembles the so-called standard train order rule found in many telegraphers' agreements and which has been the subject of numerous awards of this Division of the Board. There are significant differences, however. It relates specifically to the type of communication involved in the present case. But its effectiveness is clearly restricted to "stations or offices where an operator is available." Thus the applicability and effectiveness of the rule depends on the facts of each case. Here, the decisive fact question is whether an operator was available at Bluffton at the time the alleged violations occurred.

The Employes asserted the claim and thus assumed the burden of establishing the facts necessary to prevail. A careful study of record shows very clearly that they failed to meet their burden of proof. They contended that the Claimant could have been made available. They do not show, or even suggest how this could have been done, since he in fact was on duty at Mt. Blanchard, some eighteen miles from Bluffton, at the crucial times. If there was some way this employe could also have been available at Bluffton, the burden of establishing such fact was on the Employes. Nor do they show, or even suggest, that some other operator was available.

In accordance with many prior awards, too numerous to mention, this claim must be dismissed for want of proof.

FINDINGS: The Third Division of the Adjustment Board, up on the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the claim must be dismissed for failure of proof.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schultz
Executive Secretary

Dated at Chicago, Illinois this 19th day of February 1971.

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